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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PEBBLE LIMITED PARTNERSHIP, Plaintiff, v. ENVIRONMENTAL PROTECTION AGENCY and GINA MCCARTHY, Defendants.	Case No. 3:14-cv-00171-HRH **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS (Fed. R. Civ. P. 8, 12(b)(1), 12(b)(6), 41(b))**

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INTRODUCTION

The fundamental goal of Pebble Limited Partnership ("Pebble") in bringing this Federal Advisory Committee Act ("FACA") lawsuit is not to ensure that the Environmental Protection Agency ("EPA") complies with FACA's procedural requirements regarding the establishment of formal federal advisory committees; those formal requirements are inapplicable to the informal coalitions that plaintiff alleges existed here. Nor is this lawsuit about vindicating concepts of openness and transparency; while Pebble complains about the routine contacts that anti-mine groups had with the EPA, its First Amended Complaint[1] does not mention any of the countless contacts that Pebble had with EPA officials, including the EPA Administrator. Instead, and as the introduction to the Amended Complaint makes clear, this case is solely about undermining EPA's proposal to protect certain waters in the Bristol Bay watershed.[2] That gambit fails, however, because this Court lacks jurisdiction over plaintiff's claims and plaintiff's allegations cannot be squared with the requirements of FACA.

The substantive injury of which Pebble complains is not the type of harm that FACA – a procedural statute – is designed to protect. There is, quite simply, no procedural harm – and hence no injury – that Pebble can identify. Throughout this litigation, and in its Amended Complaint, plaintiff has presented a one-sided story in which it has characterized the EPA as acting in alleged concert with individuals and organizations that are opposed to mining the Pebble deposit. For purposes of determining its jurisdiction to hear plaintiff's claims, however, this Court need not and should not limit its analysis to plaintiff's one-sided characterizations. A full analysis reveals that

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1 Dkt. No. 95. ("Am. Compl.").

2 *See* Am. Compl. ¶¶ 4, 6.

Pebble has had numerous opportunities to make its views known to the EPA. The EPA granted virtually every meeting request that Pebble made to the EPA, which resulted in approximately 30 in-person meetings between 2003 and 2013, including ten meetings with the EPA Regional Administrator and three meetings with the EPA Administrator. Pebble therefore cannot claim that it has been injured because it did not have the ability to provide its input to the EPA.

Further, any alleged violations of FACA that might arguably have occurred regarding the creation of the Bristol Bay Watershed Assessment ("BBWA") or the separate undertaking of the Clean Water Act Section 404(c) process have already been cured. Regarding the BBWA, EPA provided both Pebble and the public at large with numerous opportunities to participate in the creation of that scientific document. As a result of this process, Pebble was able to submit 25,000 pages of environmental data to the EPA, and EPA staff held a four-day meeting with Pebble and others in Anchorage to discuss those data. Members of the public submitted more than 1,000,000 comments throughout the process of creating the BBWA (with Pebble submitting more than 1,700 pages of those comments). The Section 404(c) process was equally open and transparent: The EPA held a 60-day public comment period, during which it received 670,000 comments on the Regional Administrator's proposed determination. Pebble participated then, too, submitting over 1,100 pages of written comments. In short, any alleged FACA-related flaws have long-since been cured by the EPA's transparent processes and Pebble's participation in those processes. Accordingly, because plaintiff cannot demonstrate that it suffers from a concrete injury arising from alleged FACA violations, this Court lacks jurisdiction over plaintiff's claims.

That said, as demonstrated below, there were no FACA-related flaws, and plaintiff has identified none in its Amended Complaint. For that reason, this Court also should dismiss plaintiff's

Amended Complaint for failure to state a claim. Plaintiff's one-sided allegations do show that various outside organizations repeatedly tried to make their views known to, and provided information to, the EPA. But the mere existence of a loose coalition of organizations that was opposed to mining the Pebble site does nothing to indicate that the EPA actually "established" or "utilized," within the meaning of FACA, any of the plaintiff's three alleged advisory committees, much less that EPA exercised strict management and control that is the hallmark of a FACA committee. As for two of those so-called committees – the "Anti-Mine Coalition" and the "Anti-Mine Scientists" – plaintiff concedes that these coalitions had their genesis when anti-mine individuals and groups decided to coordinate and collaborate amongst themselves. Plaintiff alleges that these groups later "transformed" into FACA committees but fails to adequately allege facts showing that any committees existed, much less that they were subject to FACA. Instead, plaintiff presents a series of confusing and contradicting allegations that, at most, merely show that these coalitions tried to influence the EPA, and that the EPA had an open-door policy toward these coalitions (just as it had an open door with Pebble). Clearly, it was not Congress' intent under FACA to prohibit such an open-door policy.

Plaintiff fares no better with its allegations regarding the "Anti-Mine Assessment Team," which is nothing more than plaintiff's amalgam of the Intergovernmental Technical Team ("IGTT") and the Bristol Bay Assessment Team ("BBAT"). Both the IGTT and the BBAT did exist, but that does not make them subject to FACA, and plaintiff has failed to adequately plead facts that demonstrate otherwise. As alleged in the Amended Complaint, the IGTT consisted exclusively of governmental representatives and, as such, falls within an exemption to FACA that was created by the Unfunded Mandates Reform Act ("UMRA"). Even if it did not, the document on which the

Amended Complaint relies for its allegations regarding the IGTT demonstrates that its members provided individual advice. As for the BBAT, in addition to EPA employees, it merely consisted of EPA contractors and two members of a Congressionally authorized program that allows retired and unemployed older Americans to share their expertise with the EPA. The use of these contractors and other individuals does not implicate any of FACA's concerns. That is especially the case where, as alleged by plaintiff here, these contractors and other individuals provided operational support to the EPA.

Lastly, Pebble's Amended Complaint fails to comply with Rule 8. Although it is a bit shorter than the previous complaint, the Amended Complaint is still replete with lengthy, confusing, and self-contradicting allegations that do not bear on plaintiff's FACA claims. Such allegations obscure the legal issues that are the key to resolving this lawsuit: whether the EPA "established" or "utilized" advisory committees within the meaning of FACA. Instead, the Amended Complaint is prolix with evidentiary detail. Pebble also alleges numerous wholly irrelevant "facts" including, in particular, allegations about EPA's responses to Freedom of Information Act ("FOIA") requests and assertions that those responses are somehow inadequate based on communications that Pebble has claimed it has had with a House Oversight Committee and the EPA's Office of the Inspector General ("OIG").[3] Plaintiff's inclusion of these and other like allegations reveals the weakness of its claims. As this Court has already admonished plaintiff once regarding its complaint, dismissal for repeated violations of Rule 8 is also appropriate.

[3] The EPA OIG contacted undersigned counsel for defendants to inform the Department of Justice that, contrary to the assertions in the Amended Complaint, no OIG employee is known to have made any representation to Pebble or to its attorneys and/or representatives concerning the number or volume of documents that OIG has received from the EPA.

STATUTORY BACKGROUND

1. The Federal Advisory Committee Act.

Congress enacted FACA to reduce the growing cost of unnecessary blue ribbon commissions, advisory panels, and honorary boards set up by the government to advise the President and federal agencies. The statute's purpose is to eliminate committees that have outgrown their usefulness and impose uniform procedures on those that are indispensable. *See* 5 U.S.C. App. 2 § 2(b).

To achieve these goals, FACA imposes an array of procedural requirements on the creation and operation of "advisory committees." The Act requires that "[n]o advisory committee shall be established unless such establishment is . . . determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator [of the General Services Administration] with timely notice published in the Federal Register . . . ." 5 U.S.C. App. 2 § 9(a)(2). An "advisory committee" cannot meet or take any action until a detailed charter is filed with the head of the agency to which it reports and with the House and Senate committees having legislative jurisdiction over the agency. *Id.* § 9(c).[4] Furthermore, agencies must "designate[ ] an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee"; "[n]o advisory committee shall conduct any meeting in the absence of that officer or employee." *Id.*

[4] The charter requirements make clear the formal nature of committees subject to FACA by requiring such information as "the committee's official designation," 5 U.S.C. App. 2 § 9(c)(A), "the period of time necessary for the committee to carry out its purposes," *id.* § 9(c)(C), "a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions," *id.* § 9(c)(F), "the estimated annual operating costs in dollars and man-years for such committee," *id.* § 9(c)(G), "the estimated number and frequency of committee meetings," *id.* § 9(c)(H), and "the committee's termination date, if less than two years from the date of the committee's establishment," *id.* § 9(c)(I).

§ 10(e). "Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government." *Id.* § 10(f). Every "advisory committee" must give advance notice in the Federal Register of any meetings, *id.* § 10(a)(2), hold all meetings open to the public (unless a meeting can be closed in accordance with the exceptions listed in the Government in the Sunshine Act, 5 U.S.C. § 552b(c)), *id.* §§ 10(a)(1), (d), keep "[d]etailed minutes of each meeting . . . and copies of all reports received, issued, or approved by the advisory committee," *id.* § 10(c), make its records available to the public for "inspection and copying at a single location" in accordance with FOIA, *id.* § 10(b), be "fairly balanced in terms of the points of view represented and the functions to be performed," *id.* § 5(b)(2), and "not be inappropriately influenced by the appointing authority or by any special interest." *Id.* § 5(b)(3). Finally, agencies shall "keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities." *Id.* § 12(a).

FACA does not, however, seek to bring every committee within its ambit. FACA defines an "advisory committee" as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof" that is "established" by statute, or "established or utilized" by the President or by one or more federal agencies, "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." *Id.* § 3(2). In addition, the General Services Administration ("GSA") has promulgated regulations providing guidance to agencies and the public about FACA's requirements. *See* 41 C.F.R. Pt. 102-3. The guidance addresses the question, "[w]hat types of committees or groups are *not* covered by the Act and this part?" 41 C.F.R. § 102-3.40 (emphasis added). Several subsections are directly relevant here:

> (d) *Committees not actually managed or controlled by the executive branch.* Any committee or group created by non-Federal entities (such as a contractor or private organization), provided that these committees or groups are not actually managed or controlled by the executive branch;
>
> (e) *Groups assembled to provide individual advice.* Any group that meets with a Federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole;
>
> (f) *Groups assembled to exchange facts or information.* Any group that meets with a Federal official(s) for the purpose of exchanging facts or information;
>
> (k) *Operational committees.* Any committee established to perform primarily operational as opposed to advisory functions Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing Government decisions or policy. . . .

Id. § 102-3.40(d), (e), (f), & (k).[5]

In addition, the Unfunded Mandates Reform Act of 1995 ("UMRA") provides an exception to FACA's requirements in order to allow federal agencies to solicit the views of, and receive input from, state, local, and tribal governments. UMRA applies to meetings between federal officials and state, local, and tribal officials whenever such meetings are for the purpose of exchanging views, information, and advice regarding the implementation of federal programs that share intergovernmental responsibilities or administration. 2 U.S.C. § 1534(b)(1), (2). UMRA's exception to FACA is construed broadly. *See* Office of Management and Budget, Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of Title II of Public Law 104-4, 60 Fed. Reg. 50,651, 50,653 (Sept. 29, 1995).

Thus, to allege a FACA violation, a party must aver facts showing that an executive branch agency "established or utilized" an advisory committee (that is not covered by the UMRA

[5] GSA's authority for administering FACA and issuing regulatory guidance is contained in section 7 of the Act and in Executive Order 12021. *See* 66 Fed. Reg. 37728 (July 19, 2001).

exemption) as those terms are used in the Act. 5 U.S.C. App. 2 § 3(2). Those terms, however, do not employ their colloquial meaning. In *Public Citizen v. U.S. Department of Justice*, the Supreme Court narrowly construed the term "utilized." Characterizing "utilized" as a "woolly verb, its contours left undefined by the statute itself," the Court held that an "unqualified[ ]" reading of "utilized" would violate the intention of Congress by "extend[ing] FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice." 491 U.S. 440, 452 (1989). "Recognizing the Pandora's Box that could erupt if FACA were construed broadly," the interpretation of FACA that the Court adopted in *Public Citizen* thus is a "restrictive" one. *NRDC v. EPA*, 806 F. Supp. 275, 277 (D.D.C. 1992).

Under the Supreme Court's restrictive standard, an agency "utilize[s]" an advisory committee for purposes of FACA only if the committee "is 'amenable to . . . *strict management* by agency officials.'" *Byrd v. EPA* , 174 F.3d 239, 245 (D.C. Cir. 1999) (emphasis added) (quoting *Pub. Citizen*, 491 U.S. at 457-58). "[T]he utilized test is a stringent standard, denoting 'something along the lines of *actual management or control of the advisory committee*.'" *Id.* at 247 (emphasis added) (quoting *Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 430 (D.C. Cir. 1997)) (internal quotation marks and emphasis omitted); *see Sofamor Danek Grp., Inc. v. Gaus*, 61 F.3d 929, 936 (D.C. Cir. 1995) (similar); 41 C.F.R. § 102-3.25 (regulation of the GSA providing that a committee is "utilized within the meaning of [FACA]" only if "the President or a Federal office or agency exercises actual management or control over its operation"). Accordingly, "participation by an agency or even an agency's 'significant influence' over a committee's deliberations does not qualify as management and control such that the committee is utilized by the agency under FACA." *Byrd*, 174 F.3d at 246 (citing *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1451 (D.C. Cir. 1994)).

The Supreme Court's admonition that FACA should be construed narrowly also applies to the requirement that an advisory committee be "established" by an executive branch agency. While the question of whether a committee was established for FACA purposes "was not technically" before the Supreme Court, "the elements [the Court] used to determine the utilization issue smack of facets of the establishment issue . . . because the Court looked upon 'utilized' as a form of 'established.'" *Aluminum Co. of Am. v. Nat'l Marine Fisheries Serv.*, 92 F.3d 902, 905 (9th Cir. 1996). Thus, in its reading of *Public Citizen*, the Ninth Circuit in *Aluminum Company* noted that "[t]he Supreme Court has cautioned against literal adherence to a dictionary reading of FACA's extremely broad definition of 'advisory committee.'" *Id.* Applying that strict standard, courts have held that an advisory committee is not "established" by an agency unless it is "actually formed by the agency." *Byrd*, 174 F.3d at 245; *accord NRDC v. Abraham*, 223 F. Supp. 2d 162, 185 (D.D.C. 2002) (an agency establishes a committee if it "exercise[s] control over the committees' structure, membership and work"), *order set aside on other grounds*, *NRDC v. Dep't of Energy*, 353 F.3d 40 (D.C. Cir. 2004). In short, "'established' indicates 'a Government-formed advisory committee,' while 'utilized' encompasses a group organized by a nongovernmental entity but nonetheless so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Aluminum Co. of Am.*, 92 F.3d at 905 (quoting *Food Chem. News v. Young*, 900 F.2d 328, 332-33 (D.C. Cir. 1990)); *see also Wash. Toxics Coal. v. EPA*, 357 F. Supp. 2d 1266, 1273 (W.D. Wash. 2004) ("The fact that a federal agency obtains information or advice from a committee, formally or informally, does not automatically classify the committee as a federal advisory committee subject to FACA regulations, nor does it indicate that the agency 'utilizes' the committee.").

"In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, *an organized structure, a fixed membership, and a specific purpose*." *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 914 (D.C. Cir. 1993) (emphasis added). In addition, and for FACA to apply, an agency must receive group, as opposed to individual, advice. *See id.* (holding that, when members of a group composed of federal officials held forums with non-federal stakeholders to gather information relevant to the group's work, the meetings did not violate FACA because the groups made no effort to reach a consensus or to bring a collective judgment to bear); *see also Citizens for Responsibility & Ethics in Washington v. Leavitt*, 577 F. Supp. 2d 427, 432 (D.D.C. 2008) (group not an advisory committee where "[a]ttendees conveyed their own opinions regarding their individual areas of expertise" and no group report was created); *Am. Soc'y of Dermatology v. Shalala*, 962 F. Supp. 141, 148 (D.D.C. 1996), *aff'd*, 116 F.3d 941 (D.C. Cir. 1997) (panel did not function as a group as each panelist gave individual ratings on the questions presented); *Nader v. Baroody,* 396 F. Supp. 1231, 1234 (D.D.C. 1975) (meetings between an Assistant to the President and various executive branch officials and special interest groups, held for the purpose of exchanging views, did not constitute an advisory committee under FACA; alleged committees "were not formally organized and there is little or no continuity"); 41 C.F.R. § 102-3.40(e) (group that "provide[s] individual advice" not a committee subject to FACA).

Finally, in order for FACA to apply, any "committee" must actually be providing "advice" to the federal government. *See Sofamor Danek*, 61 F.3d at 933-34 (operational panel developing guidelines was not created to provide advice and thus was not subject to FACA); *Pub. Citizen*, 491 U.S. at 446 (for FACA to apply, work of advisory committee must be "exclusively advisory in nature"); *Wash. Toxics Coal.*, 357 F. Supp. 2d at 1272 (key test is whether committee was formed

"'for the explicit purpose of furnishing advice to the Government'") (quoting *Pub. Citizen*, 491 U.S. at 460); 5 U.S.C. App. 2 § 2(b)(6) ("the function of advisory committees should be advisory only"); 41 C.F.R. § 102-3.40(k) (providing exception for operational committees).

2. The Clean Water Act.

The EPA's activities at issue in this case were conducted pursuant to its authorities under the Clean Water Act ("CWA"). 33 U.S.C. § 1251(a). The EPA developed the BBWA pursuant to its authorities under CWA Section 104(a) and (b). *Id.* § 1254(a), (b). Section 104(a)(1) directs the EPA "to establish national programs for the prevention, reduction and elimination of pollution and as part of such programs shall . . . in cooperation with other Federal, State and local agencies, conduct and promote the coordination and acceleration of, research . . . and studies relating to the cause, effects, extent, prevention, reduction, and elimination of pollution." 33 U.S.C. § 1254(a)(1). When implementing CWA Section 104(a), CWA Section 104(b)(2) specifically authorizes the EPA to "cooperate with other Federal departments and agencies, State water pollution control agencies, interstate agencies, other public and private agencies, institutions, organizations, industries involved, and individuals . . . ." 33 U.S.C. § 1254(b)(2). The EPA developed the BBWA as part of its national program to address potential sources of pollution, including from the discharge of dredged or fill material regulated under Section 404 of the CWA.

CWA Section 404(c) provides the EPA independent authority under the CWA to prohibit the specification of, or deny or restrict the use of, any defined area as a disposal site for dredged or fill material whenever the EPA determines that discharge of such material into such area will have an unacceptable adverse effect on specified resources. *See* 33 U.S.C. § 1344(c). The EPA's regulations establish a multi-step process that includes public notices, opportunities for public comments, and

consultation with specified parties, all of which must be completed before the EPA may make a 404(c) final determination to prohibit, deny or restrict disposal of dredged or fill material into any defined area. *See* 40 C.F.R. pt. 231.

ALLEGATIONS OF THE AMENDED COMPLAINT

Plaintiff's Amended Complaint, like its previous complaint, alleges the existence of three separate advisory committees, which plaintiff calls the "Anti-Mine Coalition," the "Anti-Mine Scientists," and the "Anti-Mine Assessment Team." *See* Am. Compl. ¶¶ 29, 78, 115. As alleged by plaintiff, two of its committees – the "Anti-Mine Coalition" and the "Anti-Mine Scientists" – originally consisted of individuals and groups that coordinated and collaborated amongst themselves. Am. Compl. ¶¶ 33, 81. According to plaintiff, however, these groups at some undefined point in 2009 were somehow "transformed" into EPA-controlled advisory committees. *See id.* ¶ 35, 37, 84, 86. As for the third of plaintiff's alleged committees, Pebble claims that the "Anti-Mine Assessment Team" consisted of members of the IGTT and the BBAT. *See id.* ¶¶ 118, 119. Plaintiff also claims that the IGTT was a federal advisory committee in its own right. *See id.* ¶ 117.

The Amended Complaint, like the initial complaint, relies upon and therefore incorporates many documents that plaintiff has received through the six FOIA requests that it has served on the EPA over the past three years. *See* Am. Compl. ¶¶ 25-28. Notably, the documents on which plaintiff relies demonstrate that, over the course of several years, the EPA received many requests from outside individuals and organizations to meet with EPA officials so that stakeholders could express their views regarding proposed mining activities at the Pebble site and/or the potential environmental impacts of any such mining activity. The EPA did its best "to honor all such meeting

requests." Ex. 28.[6] At various times, the EPA received substantive, scientific information from these outside parties, some of which the EPA solicited. These allegations form the basis of plaintiff's claims regarding the "Anti-Mine Coalition" and the "Anti-Mine Scientists."

In specific regard to the "Anti-Mine Assessment Team," plaintiff claims that EPA used it for the operational purpose of researching and drafting the BBWA. Am. Compl. ¶ 120; *see also id.* ¶¶ 121, 123, 196, 198. As for the so-called IGTT "subcommittee," the exhibit that plaintiff relies upon demonstrates that it was comprised of state, local, and tribal representatives, and that it did not provide group advice. Ex. 185. The remaining members of the "Anti-Mine Assessment Team" consisted either of members of the Congressionally authorized Senior Environmental Employee ("SEE") program or employees of one of EPA's two contractors (which, as noted above, provided operational support to the EPA). *See* Am. Compl. ¶¶ 119, 129.

LEGAL STANDARDS

When a court lacks subject matter jurisdiction over a plaintiff's claims for relief, they must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In particular, Article III's "case-or-controversy" requirement bars federal courts from deciding "questions that cannot affect the rights of litigants in the case before them." *NRDC v. Jewell*, 749 F.3d 776, 781-82 (9th Cir. 2014) (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam)). To establish standing to

[6] Exhibit 28 is the basis for the allegations in Paragraph 105 of the Amended Complaint. Whenever possible, we will cite to the previous exhibit numbers that plaintiff submitted in support of its motion for a preliminary injunction. Thus, a reference to paragraph 105 of the Amended Complaint, which relies upon Exhibit 28 that plaintiff submitted in support of its preliminary injunction motion, will be cited as follows: *See* Am. Compl. ¶ 105 (Ex. 28). As described in the Legal Standards section below, this Court can consider these exhibits as part of the Government's motion to dismiss for failure to state a claim to the extent plaintiff's Amended Complaint relies upon them.

bring a claim under Article III, a plaintiff must demonstrate that: (1) it suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Id.* at 782 (citing *Friends of the Earth, Inc. v. Laidlaw Env. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)). These elements are an "indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

In evaluating its jurisdiction, this Court should not "rely simply on the allegations in the complaint to determine subject matter jurisdiction. [It] must instead look to facts outside the pleadings to determine whether [it has] jurisdiction." *Cassirer v. Kingdom of Spain,* 616 F.3d 1019, 1043 n.7 (9th Cir. 2010) (citing *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009); *see also McCarthy v. United States,* 850 F.2d 558, 560 (9th Cir. 1988) ("[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction."). Furthermore, "[n]o presumptive truthfulness attaches to plaintiff's allegations. Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Robertson*, 566 F.3d at 685.

In addition to plaintiff's burden to establish Article III standing, in order to withstand a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, "[f]actual allegations must be detailed enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations and footnote omitted). The rules of pleading require factual allegations "plausibly suggesting," and "not merely consistent

with," the elements of a valid claim for relief. *Id.* at 557; *see Moss v. U.S. Secret Serv.*, 572 F.3d 962, 968 (9th Cir. 2009).

In evaluating the sufficiency of a complaint, the Court should consider the facts alleged in the complaint, but may also consider "matters of judicial notice." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Moreover, while a court generally cannot consider exhibits outside the complaint, it can do so if those exhibits are submitted with the complaint. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). A "court may [also] consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (citations omitted). A court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Ritchie*, 342 F.3d at 908.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS.

Plaintiff's actual quarrel with the EPA, which is implicit throughout its filings in this matter, is that the EPA may take action to limit the discharge of dredged or fill material relating to mining the Pebble deposit. But harm related to a potential substantive action by an agency simply is not protected by FACA, which is a procedural statute. And even if the EPA had established unlawful advisory committees (which it did not), any alleged procedural injury that plaintiff purportedly

suffered thereby has been eliminated by the EPA's open and transparent processes as to both the BBWA and the Section 404(c) process.

As the Ninth Circuit has explained, to establish standing with regard to a procedural right, a litigant must demonstrate that "he has a procedural right that, if exercised, *could* protect [his] concrete interests and that those interests fall within the zone of interests protected by the statute at issue." *NRDC v. Jewell*, 749 F.3d at 782 (citation omitted) (emphasis in original). The zone of interests protected by FACA and potentially at issue here relates to public accountability. *Pub. Citizen*, 491 U.S. at 459. Pebble's public accountability interest – participating in agency decision-making regarding the Pebble Deposit – has been more than satisfied. Not only did the EPA make its processes open to the public generally, it repeatedly reached out to Pebble in particular for its views, and specifically sought Pebble's scientific environmental baseline data, preliminary mine plans, and other information relevant to conducting an analysis of the effect of a potential mine near Bristol Bay. The EPA considered these data and information when developing the BBWA. Moreover, Pebble has had, and will continue to have, the opportunity to present its views to the EPA in the ongoing (albeit temporarily stayed) Section 404(c) process. Pebble simply has not been deprived of any procedural rights protected by FACA that, if exercised, could further protect this interest.[7] *See NRDC v. Jewell*, 749 F.3d at 783. The record therefore does not support the conclusion

[7] Pebble also asserts that it is entitled to documents related to the activities of the alleged committees. As a threshold matter, and for the reasons set forth in Part II, *infra*, there were no committees and, hence, there are no FACA documents for the EPA to provide. Nonetheless, the EPA has created a webpage devoted to its work in the Bristol Bay watershed and through this page has made available extensive documentation about the BBWA and the Section 404(c) process, including drafts of the BBWA, public comments, information about the peer review process, the peer review reports, information about tribal consultation and coordination procedures, and webinar slides. (*available at* http://www2.epa.gov/bristolbay). Moreover, plaintiff has used its numerous

that plaintiff currently suffers any concrete injury in fact that is cognizable under FACA. As such, its claims must be dismissed for lack of subject matter jurisdiction.[8]

Moreover, even if Pebble has remaining unredressed injuries, they would not be remedied by a use injunction as to the BBWA. Pebble therefore does not have standing to obtain this remedy and the claim for the use injunction should be dismissed pursuant to Rule 12(b)(1).

A. In Light of the EPA's Open and Transparent Processes, Pebble Does Not Have Cognizable Injuries Sufficient to Establish Standing.

Pebble's allegations in the Amended Complaint regarding any supposed injury it suffered are sparse. Most specifically, it alleges that "[b]y violating FACA, EPA deprived Plaintiff of the benefits conferred by Congress of contemporaneous public involvement and transparency." Am. Compl. ¶ 168; *see also id.* ¶¶ 185, 210 (same).[9] But as explained in detail below, the EPA has been transparent

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FOIA requests (and is pursuing separate FOIA litigation) to obtain other EPA documents, including those that reflect communications between the EPA and various outside organizations regarding Bristol Bay. Even if documents existed, however, which should have been made public under FACA (which they do not), there is no basis to conclude that Pebble's public accountability interest would have differed had Pebble obtained such documents.

[8] Although defendants believe that, because Pebble did not have cognizable injuries upon filing its lawsuit the jurisdictional defect is properly characterized as a question of standing, in the alternative, the Court could consider Pebble's claims as moot because whatever injuries Pebble allegedly had in the past have been remedied by the EPA's open and transparent processes. A case is moot if "[t]he requisite personal interest that must exist at the commencement of the litigation [does not] continue throughout its existence." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (citing *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980)) ("Mootness has been described as 'the doctrine of standing set in a time frame…'").

[9] As to both the BBWA and the Section 404(c) process, plaintiff also makes a generalized allegation that "EPA has irreparably harmed Plaintiff by depriving it of its rights and by establishing and/or utilizing illegal Federal Advisory Committees to develop and implement its Section 404(c) strategy and the BBWA." Am. Compl. ¶¶ 168, 185, 210. It is unclear what rights plaintiff is even referring to. The principal purpose of FACA "was to enhance the public accountability of advisory

in its processes and Pebble has not only had extensive opportunities for contemporaneous involvement, but has taken advantage of those opportunities. This alleged injury, had it even occurred, has therefore been redressed long before Pebble filed this lawsuit and Pebble's claims must be dismissed.

1. Plaintiff's Claims as to the BBWA Should be Dismissed Because the Record Demonstrates that Pebble Participated in the EPA's Open and Transparent Processes.

The EPA developed the BBWA to conduct a "scientific assessment to evaluate how future large-scale mining projects might affect water quality and Bristol Bay's salmon fishery." Declaration of Richard B. Parkin, Dkt. No. 72 ("Parkin Decl.") ¶ 23. Before deciding to conduct the scientific assessment that resulted in the BBWA, and throughout the process of drafting the assessment itself, the EPA reached out repeatedly and extensively to Pebble for its views, input, and data, and made the process open and transparent to the public as a whole. The EPA conducted this outreach because "[m]eaningful engagement with stakeholders was essential to ensure that EPA heard and understood the full range of perspectives on the Assessment and the potential effects of mining in the region." Parkin Decl. ¶ 36. It solicited views and received input from individuals with the entire spectrum of opinions on the proposed mine. *See, e.g.*, Parkin Decl. ¶¶ 24, 34-37. Even had there been FACA violations in the drafting of the BBWA (a proposition with which defendants vigorously disagree), any such violations did not result in the loss of "contemporaneous public involvement and transparency" generally and certainly not to Pebble specifically. Am. Compl. ¶ 168.

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committees established by the Executive Branch and to reduce wasteful public expenditures on them." *Pub. Citizen*, 491 U.S. at 459. As set forth in this section, any alleged harm that Pebble may have suffered related to public accountability concerns and has long since been remedied. (And there is no basis in the Amended Complaint or the record for concluding that Pebble suffered a harm related to public expenditures.)

The EPA's outreach to Pebble (or its parent Northern Dynasty Minerals) regarding a potential mine in the Bristol Bay area spanned more than a decade and is documented extensively in defendants' opposition to the preliminary injunction. *See* Dkt. No. 71 at 9-20. The EPA engaged with Pebble repeatedly—it granted virtually every meeting that Pebble requested, and met in person with Pebble at least *30 times* from 2003 to 2013. *See* First Supplemental Declaration of Richard B. Parkin ("Supp. Parkin Decl.") ¶ 4.[10] EPA staff and management also visited the potential mine site with Pebble on at least six occasions between 2005 and 2013. *See id.* In addition to in-person meetings, EPA staff had frequent and detailed phone conversations and e-mail exchanges with Pebble or its representatives. *See id.* Moreover, from 2010 to 2013, while the EPA was in the process of creating the BBWA, Pebble met with the Administrator for the EPA on at least *three occasions* and the Regional Administrator for EPA Region 10 on at least *ten occasions*. *See id.* ¶ 5. The EPA did not just make itself generally available to Pebble; it specifically sought out Pebble's scientific data and analysis in order to inform the BBWA. *See* Parkin Decl. ¶¶ 26, 27, 29 & Exs. B & D attached thereto. When Pebble ultimately provided data to the EPA in the form of its over 25,000 page environmental baseline document, the EPA flew its technical staff to Anchorage for a four-day meeting with Pebble and others regarding this document. *See id.* ¶ 31. It is impossible to reconcile these interactions with Pebble's alleged deprivation of public involvement and transparency.

The EPA also engaged in extensive and transparent public outreach on the BBWA. The EPA held public meetings and listening sessions in Alaska throughout the period of drafting the BBWA. Declaration of Tami Fordham, Dkt. No. 73 ("Fordham Decl.") ¶¶ 27, 29, 34, 42 & Ex. J

[10] The Supplemental Parkin Declaration is being filed contemporaneously with this brief.

attached thereto; Supp. Parkin Decl. ¶ 6. The EPA also released multiple drafts of the BBWA for public comment, receiving 233,000 public comments on the first draft and 890,000 comments on the revised draft. *See* Declaration of Jeffrey Frithsen, Dkt. No. 74 ("Frithsen Decl.") ¶ 33. Pebble participated at this point as well, submitting over 1,300 pages of written comments on the first draft and over 450 pages of written comments on the second draft. Supp. Parkin Decl. ¶ 6. The EPA published "Response to Public Comments" documents on both drafts of the BBWA, large portions of which were dedicated to responding to plaintiff's comments. *Id.* Again, Pebble's involvement in this transparent process belies any alleged injury.

In addition, the draft BBWA underwent a robust external peer review process, which also incorporated input from the public. *See* Frithsen Decl. ¶¶ 6-23. The public, including Pebble, had three opportunities to participate in the peer review process – they could "(1) nominate external peer reviewers, (2) comment on the charge questions provided to the external peer reviewers, and (3) provide oral comments directly to the external peer reviewers" at the public peer review meeting in August 2012. *Id.* ¶ 10. Pebble participated in each of these ways. *Id.* ¶¶ 12-13, 17; Supp. Parkin Decl. ¶ 6. For example, at least fifteen representatives from Pebble or its business associates spoke at the August 7, 2012 external peer review meeting; these representatives comprised over ten percent of all of the meeting's speakers. Supp. Parkin Decl. ¶ 6.

Any FACA-related harm that Pebble purportedly suffered therefore was remedied by this open and transparent process, and by Pebble's repeated opportunities to participate meaningfully in it. Numerous courts have held that public participation in agency decision-making may render harmless prior FACA violations. *See, e.g.*, *NRDC v. Pena*, 147 F.3d 1012, 1026-27 (D.C. Cir. 1998) (In a FACA case, "the district court should determine whether the subsequent opportunity will

render harmless (or at least less harmful) the loss of any past opportunity to participate") (citing *Nat'l Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979)) ("Applicable rulemaking procedures afford ample opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal."); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1310 (W.D. Wash. 1994), *aff'd* 80 F.3d 1401 (9th Cir. 1996) (concluding that the "procedures afforded ample opportunity to correct [FACA] infirmities"); *Idaho Farm Bureau Fed'n v. Babbitt*, 900 F. Supp. 1349, 1365 (D. Idaho 1995) (declining to invalidate final agency rule based on alleged FACA violation in part because plaintiffs had participated actively in agency rule-making). *Cf. Fertilizer Inst. v. EPA*, 938 F. Supp. 52, 55 (D.D.C. 1996) (plaintiff did not have standing to pursue a FACA claim because its claimed injury that the EPA would adopt more stringent regulations based on a committee's recommendations was not "fairly traceable" to the alleged FACA violations). Although these cases did not explicitly frame the question in the context of an Article III injury, their analyses makes clear that Pebble no longer has (if it ever did have) a cognizable injury related to purported procedural violations. Pebble's claims as to the BBWA should therefore be dismissed for lack of subject matter jurisdiction.

2. Plaintiff's Claims as to the Section 404(c) Process Should be Dismissed Because the Record Demonstrates that Pebble Participated in the EPA's Open and Transparent Processes.

Similarly, EPA's Section 404(c) process, which afforded Pebble and the public generally extensive opportunities for input and comment, eliminated any injuries Pebble claims to have suffered by the alleged FACs. Pebble has had opportunities to inform the EPA of its views as to potential Section 404(c) action for years, and should the Court lift the current injunction, it will have additional opportunities to do so if EPA decides to move forward with the Section 404(c) process

by issuing a recommended determination. Pebble's claims as to the Section 404(c) process should therefore be dismissed because Pebble lacks an ongoing cognizable injury.

Specifically, Pebble took full advantage of the opportunities for comment and participation that the EPA provided in relation to the Section 404(c) process. Supp. Parkin Decl. ¶ 7. In response to the EPA's February 28, 2014 letter notifying Pebble of the EPA's intent to issue a Notice of Proposed Determination Pursuant to Section 404(c), Pebble submitted over 200 pages of written comments. *Id.* EPA staff and management, including the Regional Administrator for EPA Region 10, also met with Pebble's representatives in March 2014 to discuss the Section 404(c) process. *Id.* Following the EPA's issuance of the Proposed Determination on July 21, 2014, the EPA held a 60-day public comment period, during which Pebble submitted over 1,100 pages of written comments. *Id.* In total, the EPA received more than 670,000 comments on the Proposed Determination.[11] In addition, the EPA held seven public hearings on the Proposed Determination throughout Alaska in August 2014, the majority of which were attended by Pebble's representatives. *Id.* In fact, Pebble's representatives were given the opportunity to provide introductory oral testimony at the Anchorage hearing, which was attended by over 500 people, and EPA allotted these representatives more than twice the time for oral testimony as was allotted to other commenters. *Id.* Moreover, the Proposed Determination itself addresses Pebble's views in detail. *See* Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act at 2-11 to 2-14.[12] Although the Section 404(c) process currently is enjoined,

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[11] *Available at* http://www.regulations.gov/#!docketDetail;D=EPA-R10-OW-2014-0505.

[12] *Available at* http://www2.epa.gov/bristolbay/proposed-determination-pursuant-section-404c-clean-water-act-pebble-deposit-area.

should the Court lift the injunction, and should EPA Region 10 forward the recommended determination, Pebble will have additional opportunities to present its views to the EPA. *See* 40 C.F.R. § 231.6.

For all of these reasons, even if it were assumed that the EPA "created" and "utilized" advisory committees in violation of FACA, any alleged harm that plaintiff might arguably have suffered as a result has been nullified, and plaintiff accordingly cannot demonstrate ongoing injury in fact sufficient to support subject matter jurisdiction over its FACA claims.

B. Plaintiff Does Not Have Standing to Obtain a Use Injunction as to the BBWA.

Even if the Court were to determine that Pebble's claims are not as a general matter barred because it lacks a cognizable injury, Pebble must still "demonstrate standing separately for each form of relief sought." *Friends of the Earth,* 528 U.S. at 185 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); *Lewis v. Casey,* 518 U.S. 343, 358, n.6 (1996) ("[S]tanding is not dispensed in gross.")). Among the injunctive relief that plaintiff seeks, it requests that the Court "restrain and bar Defendants from using and/or relying in any way" upon the BBWA. Am. Compl. ¶ 217. Plaintiff seeks this relief whether the BBWA is used in the Section 404(c) process, which is related to plaintiff's FACA allegations, or for any other purpose.[13] Notwithstanding the breathtaking magnitude of relief that a permanent use injunction represents, such an injunction would not remedy

[13] Any such alternative purpose (such as the EPA's use of the BBWA to help evaluate a future permit application) would constitute a new proceeding unrelated to plaintiff's FACA allegations. There would be no basis therefore to preclude the EPA's use of the BBWA in such a new proceeding. To the extent that plaintiff is claiming otherwise, any such argument runs headlong into the authority that plaintiff relied on to obtain a preliminary injunction during the pendency of the EPA's Section 404(c) proceedings. In the event that the Court does not dismiss plaintiff's claims, a permanent use injunction therefore certainly would not be an appropriate remedy.

any of plaintiff's alleged FACA-related injuries. Plaintiff accordingly lacks standing to obtain this form of relief.

The Amended Complaint does not allege, nor does the record before the Court show, how a use injunction as to the BBWA would remedy any of plaintiff's alleged procedural injuries. In *NRDC v. Pena*, the D.C. Circuit made clear that a plaintiff *cannot* establish the concrete and redressable injury necessary to have standing to obtain a use injunction merely by alleging that it was denied an opportunity to participate at past meetings of a committee convened in violation of FACA or that it was denied access to that committee's documents. 147 F.3d at 1020-21. Nor can a plaintiff predicate standing on the theory that a use injunction would punish the government for past FACA violations or deter it from future violations. Such an argument:

> [E]rroneously presumes that the punitive consequences of the injunctive order suffice to establish that that order redresses the Department's past FACA transgressions. On the contrary, injunctive relief principally serves a remedial purpose, not a punitive one, and thus the injunction's collateral punitive effects do not by themselves satisfy Article III's redressability requirement.

Id. at 1022 (citing *Hartford–Empire Co. v. United States,* 323 U.S. 386, 409 (1945) ("[W]e may not impose penalties in the guise of preventing future violations.")). Moreover, as the court continued, the ongoing denial of FACA access to committee documents and records "cannot support [] standing to sue for an injunction that does not itself address the access issue." *Id.* at 1022; *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.")).[14]

[14] Although in *NRDC v. Pena* the court determined that it would remand the matter for jurisdictional discovery on the question of injury, such an outcome is not necessary here. 147 F.3d at 1024. In light of the extensive opportunities for plaintiff to participate in the creation of the

Absent some theory of punishment for past FACA violations, which is inadequate to establish standing to obtain a use injunction, plaintiff does not suffer a concrete injury that can be redressed by a permanent injunction banning the use of the BBWA. *NRDC v. Pena*, 147 F.3d at 1022. The BBWA was issued over a year ago, and "[a]s a scientific assessment, it does not discuss or recommend policy, legal, or regulatory decisions, nor does it outline or analyze options for future decisions." BBWA at ES-1[15]; *see also* Frithsen Decl. ¶ 4. Plaintiff had an opportunity to participate meaningfully in the scientific analysis that supported the BBWA. Requiring the EPA to erase the document and start from scratch, which would be the consequence of a permanent use injunction, would not redress any injury to plaintiff because, as set forth above, Pebble has already had extensive opportunities to provide its input to EPA. EPA simply reached a different scientific conclusion than that advocated by Pebble.[16] Pebble's request for a use injunction as to the BBWA should therefore be dismissed for lack of standing because it would not remedy any cognizable harm. *See id.* at 1310 (submission of the report to public comment and criticism "afford[ed] ample opportunity to correct infirmities"); *see also Nat'l Nutritional Foods Ass'n*, 603 F.2d at 336; *Idaho Farm Bureau Fed'n*, 900 F. Supp. at 1366.

BBWA described above, there is no basis to determine that the conclusions in the BBWA would have been any different absent the alleged FACA violations, and there is therefore no remaining injury to be redressed.

[15] *Available at* http://www.epa.gov/ncea/pdfs/bristolbay/bristol_bay_assessment_final_2014_vol1.pdf.

[16] It would also be a massive waste of public resources, which runs counter to the purpose of FACA. *Pub. Citizen*, 491 U.S. at 459.

II. PLAINTIFF HAS FAILED TO STATE A FACA CLAIM.

Even if the Court were to conclude that it has subject matter jurisdiction over some or all of plaintiff's claims, the allegations in the Amended Complaint fail to state a claim and should therefore be dismissed pursuant to Rule 12(b)(6). The Amended Complaint suffers from defects that run throughout its allegations as to the three so-called advisory committees. In addition, a closer inspection of the specific allegations as to each of the three alleged committees makes clear that plaintiff has failed to state a claim.

As to all three so-called committees, Pebble's Amended Complaint presents confusing and contradictory allegations that undercut any notion that advisory committees subject to FACA ever existed. While the Amended Complaint now contains some language that parrots parts of FACA, a complaint cannot simply recite statutory language in order to state a claim. *Compare* Am. Compl. ¶¶ 29, 78, 115 *with* 5 U.S.C. App. 2 § 3(2); *see Twombly*, 550 U.S. at 555 (complaint requires "more than labels and conclusions"). In addition, the Amended Complaint creates confusion about what these groups actually were, referring to each of them variously as a "committee," "board," "commission," "council," "conference," "panel," "task force," some sort of "similar group," or "subcommittee or other subgroup." *See* Am. Compl. ¶¶ 29, 78, 115. In this regard, plaintiff's allegations are now even *more* confusing than the now-abandoned claims that these were "de facto" committees.

Read as a whole, the Amended Complaint and the exhibits on which it relies, rather than plausibly supporting each of the individual elements necessary to state a cognizable FACA claim, *Twombly*, 550 U.S. at 557, make clear that the EPA could not have violated FACA. Plaintiff, for example, alleges that the "Anti-Mine Coalition" and the "Anti-Mine Scientists" were originally

formed, not by the EPA, but on their own initiative as a loose coalition of individuals and organizations opposed to mining operations, and that it was only later that these coalitions were somehow "transformed" into advisory committees. *See* Am. Compl. ¶¶ 33, 35, 81, 82, 84. Yet Pebble does not say how, exactly, these entities were "transformed" into FACA advisory committees with a fixed membership. Instead, plaintiff relies on conclusory allegations that at some undefined point "in 2009" the EPA somehow "established and/or began utilizing" these organizations. Pebble does not even commit to whether the EPA "established" these so-called committees, or instead began "utilizing" them. *Id.* ¶¶ 37, 86. Such allegations are insufficient under *Public Citizen* and its progeny, which make clear that a cognizable claim under FACA depends on facts showing that any agency actually "established" or "utilized" a committee such that it is subject to "strict management" by agency officials. *See Aluminum Co. of Am.*, 92 F.3d at 905.[17]

Washington Toxics Coalition v. EPA is directly on point. In that case, an agricultural chemical trade association task force met with the EPA to discuss the methodology that the task force would use for gathering data to be submitted to the EPA pursuant to various statutory requirements. 357 F. Supp. 2d at 1269. That task force "maintained a relationship" with the EPA and "frequently

[17] To be sure, the EPA knows how to establish Federal Advisory Committees when it needs to rely upon them for providing advice. It has a webpage devoted to FACA, including a specific page that identifies all EPA Advisory Committees, identifies each committee's designated officer, provides a description of the committee, and identifies upcoming meeting dates. *See* http://www.epa.gov/ocem/faca/facacomcontacts.htm. The EPA also provides guidance on what does, and does not, constitute a Federal Advisory Committee. *See* http://www.epa.gov/ocem/faca/hb/index.html. Needless to say, none of plaintiff's alleged "advisory committees" appear on this list, much less exhibit the characteristics of a Federal Advisory Committee. That fact, as well, demonstrates that no such advisory committees ever existed, as "it is a rare case when a court holds that a particular group is a FACA advisory committee over the objection of the executive branch." *Aluminum Co. of Am.*, 92 F.3d at 905 (quoting *AAPS*, 997 F.2d at 914).

request[ed] feedback on its developing methodology for meeting [EPA] data requirements. *Id.* EPA officials furthermore attended task force meetings and "corresponded regularly" with the task force. *Id.* Plaintiffs claimed that the EPA violated FACA by establishing the task force, but the court rejected a set of arguments that are substantially like Pebble's arguments here:

> Plaintiffs allege that EPA "established" [the task force], but have pointed to no evidence in the record that indicates that EPA . . . actually formed [the task force]. Plaintiffs state only that EPA provided [the task force] with "collaboration," and "guidance . . . critical to [the task force's] emerging agenda." Even if these allegations were supported by the evidence, which they are not, this would be insufficient to indicate that EPA formed, or "established," [the task force]. . . . The mere fact that [the task force] consulted with EPA about whether its proposed methods for obtaining and compiling data would meet [EPA] requirements for species proximity data simply does not show that EPA formed [the task force].

Id. at 1272 (internal citations omitted). The court similarly made quick work of plaintiffs' contention that the EPA "utilized" the task force merely because the EPA regularly communicated with task force members or used some of the task force's work product:

> Plaintiffs allege that EPA and [the task force] maintained a close relationship prior to [the task force's] formal establishment as a committee and maintained this relationship after it was formed. Plaintiffs also assert that EPA encouraged [the task force's] development and approved or disapproved of [the task force's] proposals for meeting EPA data requirements, and that EPA acknowledged [the task force's] policy goals. . . . The "mere subsequent and optional use of the work product of a committee by a federal entity does not involve utilization under FACA." The fact that EPA uses data compiled by [the task force] . . . simply does not mean that [the task force] . . . is a federal advisory committee. Communication between EPA and [the task force] was entirely appropriate, and any alleged communication addressing "policy" issues between them does not change the Court's analysis. As long as the committee is not a federal advisory committee under the legal standard delineated in *Public Citizen*, the Court does not find anything in the statute to indicate that federal agencies may not consult with such committees regarding policy issues without subjecting those committees to FACA regulations. Furthermore, assuming that EPA influenced the formation of [the task force] as well as its methodology for meeting [EPA] data requirements, this does not indicate that EPA "utilized" [the task force] under FACA, because "influence is not control."

Id. at 1273-74 (internal citations omitted).

If anything, the task force at issue in *Washington Toxics Coalition* was much more structured than the ephemeral coalitions that Pebble alleges exist here. Here, what Pebble is complaining about is that the EPA had many meetings with, and sent communications to or received communications from, outside groups that did not share plaintiff's interests. But these meetings and communications do not constitute a federal advisory committee. FACA was not enacted to create a wall between federal agencies and the public, or to prevent the public from attempting to influence agency policy, or to prevent agencies from relying upon information provided to them.[18] Instead, FACA was "born of a desire to assess the need for the 'numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch.'" *Pub. Citizen*, 491 U.S. at 445-46 (quoting 5 U.S.C. App. 2 § 2(a)). None of plaintiff's allegations fall within that narrow scope.

A. Plaintiff Has Failed to State a Claim Regarding the So-Called "Anti-Mine Coalition."

While Pebble alleges a conclusion that the "Anti-Mine Coalition" was a "discrete, definable group," Am. Compl. ¶ 31, the facts and exhibits on which plaintiff relies indicate otherwise.[19]

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[18] In fact, CWA section 104(b)(2) specifically authorizes the EPA to cooperate with governments, institutions, organizations, industries involved, and individuals when conducting studies about pollution.

[19] As a threshold matter, plaintiff defines this committee to consist of both people and organizations, including numerous corporations. *See* Am. Compl. ¶ 31 (including, as members of the advisory committee, Trout Unlimited, the Bristol Bay Regional Seafood Development Association, the Center for Science in Public Participation, the Bristol Bay Native Corporation, Bristol Bay United, the Nature Conservancy, the National Wildlife Federation, the Bristol Bay Native Association, the Wilderness Society, the Alaska Conservation Foundation, and the National Resources Defense Council). The Amended Complaint fails to address how an "advisory committee," in addition to actual people, can consist of such organizations, including holding meetings at which the "corporations" are present and providing "group advice."

As discussed above, plaintiff's contention that the EPA "established" the so-called "Anti-Mine Coalition" within the meaning of FACA is contradicted by its concession that outside organizations opposed to Pebble's intended mining operations formed this so-called group for the purpose of influencing the EPA. *See* Am. Compl. ¶¶ 33, 34. Plaintiff's conclusory assertion that the Anti-Mine Coalition somehow "transformed" such that it was "established and/or utilized" by the EPA (*id.* ¶¶ 35, 37) is not adequately supported by facts alleged in the Amended Complaint. It therefore does not state a viable FACA claim. *See Twombly*, 550 U.S. at 555 (a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). As explained above, such conclusory and contradictory allegations fall woefully short of substantiating the elements of a viable FACA claim pursuant to the standards set forth in *Public Citizen* and *Aluminum Company of America*.

Plaintiff's allegations regarding the structure and functioning of this so-called committee are also legally deficient. For example, plaintiff does not adequately allege that this coalition ever met together as a group or allege any other facts which might plausibly support the conclusion that it provided the EPA with "group advice and recommendations through white papers, memos, and presentations to EPA." Am. Compl. ¶ 64. Importantly, by "group advice," plaintiff does not contend that the coalition actually provided advice as a group. Rather, plaintiff cites a series of examples that demonstrate that individuals or organizations either shared their own views or, at most, shared anti-mine views that many held in common. Indeed, the very first example of "group advice" that plaintiff provides involves a memo from Jeff Parker, in which he makes clear that he is providing his own views. *See id.* ¶ 65 (Ex. 3) ("Thank you for asking for *my* thoughts . . . .") (emphasis added). The remaining examples plaintiff cites in that portion of the Amended

Complaint similarly show that the EPA received individual views or scientific information from individual groups. *See id.* ¶ 67 (Ex. 137) (EPA received individual e-mail from Shoren Brown); *id.* ¶ 68 (Ex. 15) (individual advice); *id.* ¶ 69 (Ex. 73) (individual views). These allegations fail to adequately allege that the EPA received group advice from this so-called coalition or that this coalition otherwise implicated FACA.[20]

Plaintiff also claims that the EPA "decided who should be members" of this so-called coalition by "connecting coalition members to other members." Am. Compl. ¶¶ 40, 42. That allegation, however, contradicts plaintiff's claim that the members of this coalition first coordinated and collaborated amongst themselves. *Id.* ¶ 33. The allegation further fails to demonstrate that it

[20] Plaintiff's Amended Complaint is riddled with other examples of the EPA innocuously soliciting or receiving individual views; in many cases, outside organizations requested meetings, set agendas, and decided who would attend. *See*, *e.g.*, Am. Compl. ¶ 51 (Ex. 41B) (Nature Conservancy document provided to the EPA, merely showing that one alleged organizational member of the alleged committee provided information to the EPA); *id.* ¶ 52 (Ex. 59) (e-mail indicates that the EPA was asking for information from the Nature Conservancy; no indication that anyone other than Shoren Brown and individuals from the Nature Conservancy would be meeting with EPA); *id.* ¶¶ 53, 54 (Ex. 67) (showing that the EPA was meeting with Trout Unlimited and authors of a report in order to ask questions about a report); *id.* ¶ 55 (alleging merely that various individuals had the ability to meet with various EPA officials at undefined times); *id.* ¶ 57 (Ex. 216) (indicating that Phil North planned to meet with three individuals from the Nature Conservancy); *id.* ¶ 59 (Ex. 9) (meeting, which was held at the request of Trout Unlimited, at which outside individuals and groups "hope to discuss their Request for Clean Water Act 404(c) Action"); *id.* ¶ 60 (Ex. 39) (exhibit merely shows that pro-mine and anti-mine groups are trying to make their views heard before the EPA); *id.* ¶ 61 (Ex. 93) (meeting with the EPA for sharing information, not providing advice; meeting held at request of stakeholders, and not the EPA; meeting did not include all, or even a majority, of individuals plaintiff identifies as being members of the so-called advisory committee); *id.* ¶ 62 (Ex. 93) (the fact that two separate organizations have commissioned technical experts to develop data and expert opinions to provide to the EPA does not support a FACA claim, as it does not show that the EPA established or utilized an advisory committee that provided group advice from the committee); *id.* ¶ 63 (Ex. 102) (showing that stakeholder organizations were independently working to provide the EPA with information; no evidence of management or control by the EPA).

was the EPA that decided who would be members, as even under plaintiff's networking theory (alleging that the EPA "connect[ed]" coalition members with each other), it would ultimately be up to the "coalition members" themselves to decide whether to actually "connect[ ]" with anyone that the EPA may have identified. Also, the allegation certainly does not demonstrate that the EPA was exercising "strict management" of this coalition (to the extent a pre-existing "coalition" could even be said to be subsequently amenable to strict management). *Byrd*, 174 F.3d at 245 (quoting *Pub. Citizen*, 491 U.S. at 457-58); *see also Sofamor Danek*, 61 F.3d at 936; 41 C.F.R. § 102-3.25.

Plaintiff similarly claims that the EPA set the "agenda" for this coalition because it allegedly decided, early-on, to oppose mining the Pebble deposit. *See* Am. Compl. ¶ 41. But the test for utilization is *actual management or control* of the committee, which means that, among other requirements, the EPA must control what is discussed at advisory committee meetings. *See* 5 U.S.C. App. 2 § 10(e), (f) (agenda for meetings must be approved by the federal designated officer); 41 C.F.R. § 102-3.25 (utilization requires "actual management or control over [committee's] operation"). Allegations that imply that the EPA may have had a particular view on a substantive matter have no bearing on whether the EPA was exercising "actual management or control" of the alleged advisory committee. *See Byrd*, 174 F.3d at 247.

Finally, plaintiff claims that "EPA personnel also co-drafted certain memos with the Anti-Mine Coalition members," Am. Compl. ¶ 64, and that the EPA sought information from various scientists, *id.* ¶ 74. As to the former allegation, whether specific EPA personnel worked on "certain" memoranda with certain outside individuals does not bear on whether a FACA *committee* was established or utilized by the EPA, or whether the EPA received actual *group advice* from any such committee. As to the latter allegation, once again the exhibits upon which plaintiff relies bely rather

than support any notion that a FACA committee existed, as they make clear that these scientists were unknown to the EPA (evidenced by the fact that Shoren Brown had to include the biographies for the scientists providing information), no advice was sought (as the purpose of the meeting was merely to "shar[e] current science"), and this was not an EPA-managed group (as Palmer Hough from the EPA said that he looked "forward to hearing from you and your group"). *See* Exs. 25A, 25B. Plaintiff's other allegations in this regard fail for similar reasons. *See, e.g.*, Am. Compl. ¶ 73 (Ex. 84) (Trout Unlimited provided science briefing).

B. Plaintiff Has Failed to State a Claim Regarding the So-Called "Anti-Mine Scientists."

Just as with the so-called "Anti-Mine Coalition," plaintiff's allegations regarding the so-called "Anti-Mine Scientists" begin with an assertion that members of this alleged group "began to coordinate and collaborate first amongst themselves to develop collective support for EPA." Am. Compl. ¶ 81; *see also id.* ¶¶ 82-83. Just as with the so-called "Anti-Mine Coalition," plaintiff includes a vague allegation that, at some point and in some undefined manner, this group "transformed" into an advisory committee. *Id.* ¶ 84; *see also id.* ¶ 86 (alleging that the EPA "established and/or began utilizing the Anti-Mine Scientists FAC in 2009"). And like its allegations regarding the "Anti-Mine Coalition," plaintiff makes conclusory allegations regarding the so-called "Anti-Mine Scientists" that parrot language from FACA. *See id.* ¶¶ 85, 87, 88, 90, 91, 92. Moreover, the only difference between what plaintiff calls the "Anti-Mine Coalition" and the "Anti-Mine Scientists" seems to be plaintiff's characterization of the purposes of each of these so-called groups (*i.e.*, providing political support or technical support). As explained above, these allegations fail to state a claim.

Plaintiff's substantive allegations regarding the so-called "Anti-Mine Scientists" also suffer from the same flaws as its allegations regarding the "Anti-Mine Coalition"; namely, the allegations

fail to state a claim and are undercut by the exhibits upon which plaintiff's Amended Complaint relies. Plaintiff asserts that "EPA officials frequently requested that some or all of the same core group of Anti-Mine Scientists be in attendance for meetings." Am. Compl. ¶ 92. The one example plaintiff cites for this specific proposition, however, is merely an e-mail exchange between Phil North and Shoren Brown, in which Mr. Brown requested meetings so that attendees could present their "ask" to the EPA, and Mr. North in turn suggested that Mr. Brown bring technical people. *Id.* ¶ 93 (Ex. 110). Many of the other examples that plaintiff relies upon for like propositions merely reflect the sharing of an individual group's or organization's scientific expertise with the EPA, rather than demonstrate that the EPA *established or utilized* any such committee as contemplated by FACA.[21]

Plaintiff also alleges that the EPA determined who would belong to this committee "by including only members with anti-mine viewpoints." Am. Compl. ¶ 94. That allegation, however, is contradicted by plaintiff's previous allegation that membership in this so-called group evolved as individuals and organizations interested in preserving Bristol Bay coordinated and collaborated

[21] *See* Am. Compl. ¶ 102 (allegation that the EPA arranged briefings with various outside organizations does not show that the EPA established or utilized a committee); *id.* ¶ 104 (Ex. 142) (similar); *id.* ¶ 105 (Ex. 28) (e-mail referring to two separate briefings on two separate dates, each "at the request of" Trout Unlimited and Bristol Bay Native Corporation, and noting that it is the policy of EPA's Office of Wetlands, Oceans, and Watersheds "to do our best to honor all such meeting requests"); *id.* ¶ 106 (Exs. 112, 67) (report written by Trout Unlimited and the Wild Salmon Center and reviewed by the EPA does not show that the EPA established or utilized a committee, even if the EPA received the report a few weeks in advance of its public release; subsequent call with Trout Unlimited's representatives merely to provide overview of report and answer any questions); *id.* ¶¶ 107, 108 (Exs. 24, 79) (distributing a report developed by outside entities does not show that the EPA managed or controlled a committee, even if outside entities may have collaborated on their own to develop a document; letter thanks the EPA "for the opportunity" to meet, thus indicating meeting was not initiated by the EPA); *id.* ¶ 109 (Ex. 107) (e-mail inviting EPA employees to participate in a "Webinar" hosted by the Alaska Conservation Foundation).

amongst themselves to make their views known to the EPA. *Id.* ¶ 81. Moreover, the example that plaintiff cites for this allegation does not have anything to do with how members were "determined," but instead constitutes a substantive attack on the EPA's "further review" of certain outside reports that were provided to the agency. That allegation also acknowledges that the EPA received "many analyses submitted by the public," and not just analyses from this so-called group. *See id.* ¶¶ 94-95.[22] Plaintiff further alleges that the EPA "set the agenda" which was to "defeat the mine through use of Section 404(c) and gather data needed to support an environmental assessment that could be used to further a preemptive veto." *Id.* ¶ 99. Like its virtually identical allegation regarding the "Anti-Mine Coalition," this allegation fails because management or control requires that the EPA control what is discussed at advisory committee meetings. Plaintiff similarly makes conclusory allegations to the effect that the EPA "set the agenda for numerous meetings convened with the Anti-Mine Scientists." *Id.* ¶ 100. Plaintiff, however, once again fails to plead facts adequately in support of this conclusion, other than an instance in which the EPA arranged for a meeting with representatives from the Nature Conservancy, at the Nature Conservancy's request, to discuss its Bristol Bay Risk Assessment and to receive an update on literature compilations that various anti-mine groups had been preparing. *Id.* ¶ 101 (Ex. 59). That is not nearly enough to state a viable FACA claim.

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[22] Plaintiff similarly argues that "Anti-Mine Scientists" were used to attack and counter other viewpoints that were critical of the EPA's science. Am. Compl. ¶ 96; *see also id.* ¶¶ 97-98. That allegation, however, has no bearing on whether the EPA "established" or "utilized" this so-called committee, much less whether this committee even existed. Instead, the allegation and the examples that plaintiff provides in support plainly show that the EPA received only individual advice. *See id.* ¶ 97 (Ex. 127) (one organization, CSP2, sent EPA a document developed by one individual, Kendra Zamzow); *id.* ¶ 98 (Ex. 71) (EPA reviewed comments from Alaska Conservation Foundation).

C. Plaintiff Has Failed to State a Claim Regarding the So-Called "Anti-Mine Assessment Team."

Plaintiff's allegations regarding the so-called "Anti-Mine Assessment Team" suffer from the exact same types of flaws as the allegations regarding the other so-called committees; namely, plaintiff's Amended Complaint sets forth a series of conclusory allegations that merely mirror some of the language of FACA. *See, e.g.*, Am. Compl. ¶¶ 115, 116, 117, 120. Other portions of this section of the Amended Complaint repeat the previous allegations that the EPA received briefings and various outside reports from individuals and organizations seeking to make their views known to the EPA. *Compare id.* ¶¶ 132-134 *with id.* ¶ 102. Like the other so-called committees, the "Anti-Mine Assessment Team," as described by plaintiff, bears no resemblance to a FACA committee. Plaintiff has not adequately alleged that this group had a charter, that it held meetings at which the entire group attended, or that the EPA otherwise established or utilized the committee as those terms are used in the FACA context.[23] For the reasons set forth above, these claims fail as a matter of law.

Plaintiff's allegations regarding the "Anti-Mine Assessment Team" fail for another reason as well. Plaintiff alleges that this so-called committee consisted of members of the BBAT and the IGTT. Am. Compl. ¶ 118. To be sure, there was a BBAT and an IGTT, but just because these

[23] Plaintiff also confuses the "Anti-Mine Assessment Team" (plaintiff's made-up entity) with the BBAT (a team that did actually exist, though not as plaintiff describes it in the Amended Complaint). *See* Am. Compl. ¶ 121 (alleging that the "EPA established the *Anti-Mine Assessment Team FAC* in December 2010," and then including the unrelated allegation that "EPA's Richard Parkin was designated the *BBAT* Leader," apparently implying that the so-called "Anti-Mine Assessment Team" had a leader) (emphasis added).

entities existed does not make them subject to FACA.[24] Instead, plaintiff relies upon its conclusory allegations that the IGTT violated FACA, that the EPA violated FACA through its use of contractors within the BBAT, and that the EPA violated FACA through its use of SEE Program members within the BBAT. As explained below, none of these allegations – which together form the basis of plaintiff's claim regarding the "Anti-Mine Assessment Team" – support a FACA claim.

1. The IGTT Did Not Violate FACA.

a. The Unfunded Mandates Reform Act of 1995 Excludes IGTT Meetings from the Reach of FACA.

The Unfunded Mandates Reform Act of 1995 ("UMRA"), Pub. L. 104-4, reflects the fact that "an important part of efforts to improve the Federal regulatory process entails improved communication with State, local, and tribal governments." H.R. Rep. No. 104-76, at 40 (1995) (Conf. Rep.). UMRA requires "Federal agencies to establish effective mechanisms for soliciting and integrating the input of [state, local, and tribal] interests into the Federal decision-making process." *Id.* To that end, and in order to encourage the solicitation of the views of other levels of government, UMRA contains an exception from FACA that allows federal agencies to solicit the views and input of those governmental entities on the implementation of federal programs where there are shared intergovernmental responsibilities or administration.

Section 204 of UMRA sets forth a two-part test to determine whether intergovernmental communications are exempt from FACA:

> (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) acting in their official capacities, and

[24] Moreover, plaintiff does not contend that the BBAT was itself a separate committee that is subject to FACA (as it does with the IGTT, *see* Am. Compl. ¶ 117).

> (2) such meetings are solely for the purpose of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

2 U.S.C. § 1534(b)(1), (2). As stated in the Office of Management and Budget's guidance, UMRA's "exemption should be read broadly to facilitate intergovernmental communications on responsibilities or administration." OMB, Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of Title II of Public Law 104-4, 60 Fed. Reg. 50,651, 50,653 (Sept. 29, 1995).[25] The guidance further explains that "[t]he scope of meetings covered by the exemption should be construed broadly to include *any* meetings called for *any* purpose relating to intergovernmental responsibilities or administration." *Id.* (emphasis added).

The IGTT meets both parts of the UMRA exception to FACA. As to the first element, plaintiff concedes that the IGTT consisted of "representatives from State and Federal Government Agencies and from Tribal Governments." Am. Compl. ¶ 147.[26] Nor could plaintiff allege otherwise; the principal exhibit upon which plaintiff has relied for the IGTT makes as much clear. *See* Ex. 185 at 1 (describing group as consisting of "representatives from State and Federal

[25] The President, through OMB, is tasked with issuing guidelines for implementation of this provision of UMRA. *See* 2 U.S.C. § 1534(c).

[26] At one point, plaintiff claims that Jeff Parker was a member of the IGTT. *See* Am. Compl. ¶ 119. Elsewhere, plaintiff claims that "EPA shared the IGTT technical materials with Anti-Mine Coalition member Jeff Parker." *Id.* ¶ 151. If Mr. Parker was a member of the IGTT, it is unclear why the EPA would have needed to share the IGTT's materials with Mr. Parker; presumably, he would have already been familiar with them. In fact, and as the primary exhibit regarding the IGTT makes clear (and upon which plaintiff has repeatedly relied), Mr. Parker was not a member of the IGTT. *See* Ex. 185 (e-mail to IGTT team members in which Mr. Parker's name does not appear); *see also* Parkin Decl. ¶ 38 ("There were no private parties on the IGTT."). Plaintiff does not present any other allegations regarding Mr. Parker and the so-called Anti-Mine Assessment Team.

Governmental Agencies and from Tribal Governments" and making clear that "attendance is limited to invited State, Federal, and Tribal governments"); *see also id.* at 4 (meeting "will be limited to designated governmental agency and tribal representatives").

The second prong of this test is also easily satisfied. The EPA conducted the BBWA pursuant to its authorities under CWA Section 104(a) and (b). 33 U.S.C. § 1254(a), (b). Section 104(a)(1) directs the EPA to "establish national programs for the prevention, reduction and elimination of pollution and as part of such programs shall . . . in cooperation with other Federal, State and local agencies, conduct and promote the coordination and acceleration of, research . . . and studies relating to the causes, effects, extent, prevention, reduction, and elimination of pollution." 33 U.S.C. § 1254(a)(1). In addition, CWA Section 104(b)(2) specifically authorizes the EPA to "cooperate with other Federal departments and agencies, State water pollution control agencies, interstate agencies, other public and private agencies, institutions, organizations, industries involved, and individuals, in the preparation and conduct of such research and other activities referred to in paragraph (1) of subsection(a)." 33 U.S.C. § 1254(b)(2).

The EPA established a national program to address the potential sources of pollution including from the discharge of dredged or fill material regulated under Section 404 of the CWA. The EPA conducted the BBWA as part of this program and, pursuant to CWA section 104, conducted a study of the resources of Bristol Bay and the effect of pollution from large scale mining on those aquatic resources.

Plaintiff's claims make clear that the IGTT meetings were conducted for the sole purpose of allowing representatives from other federal agencies, state agencies, and tribal governments to provide technical input into the BBWA. For example, plaintiff explains that the EPA selected IGTT

members "because they *shared governmental interests in* and expertise in the geographical area potentially affected by the development of the Pebble Mine." Am. Compl. ¶ 205 (emphasis added); *see also* Ex. 185 at 1. In particular, the EPA encouraged representatives to "share their understanding of the watersheds, including identification of scientific and traditional tribal data and information which may be helpful in our watershed assessment." Ex. 185 at 4; *see generally* Am. Compl. ¶¶ 146-48. Therefore, the IGTT meetings fall squarely within the second prong of UMRA as they were conducted consistent with CWA Section 104, which recognizes the shared role of the EPA, other federal agencies, the State of Alaska, and tribal governments in cooperating on studies relating to the effects of pollution. *See e.g., Wyo. Sawmills, Inc. v. U.S. Forest Serv.*, 179 F. Supp. 2d 1279, 1305-06 (D. Wyo. 2001) (holding that consultations among representatives from federal entities, and state, local and tribal governments fell within the UMRA exception because such meetings fulfilled the Forest Service's "obligation under the NHPA to consult with the other Federal, State, and local agencies and Indian tribes with respect to preservation-related activities").

b. The IGTT Did Not Provide Collective or Group Advice.

Even if the IGTT was not exempt from FACA through the operation of the UMRA, plaintiff's claim regarding the IGTT still fails. "Groups assembled to provide individual advice" are not subject to FACA. 41 C.F.R. § 102-3.40(e). While plaintiff alleges that "[t]he IGTT was established in the interest of providing collective advice and recommendations," Am. Compl. ¶ 145, the exhibit on which it relies contradicts this assertion. According to the IGTT's own guidelines, "[t]he [IGTT] is not expected to reach consensus recommendations; rather representatives are encouraged to share their professional expertise individually." Ex. 185 at 5. Those guidelines also state that "[a]ll written information or data shared by the team members will be part of EPA's open

and transparent process, may be used in the assessment *and attributed to individuals*, and will be publicly releasable," a warning that would be unnecessary if the team were providing group advice. *Id.* (emphasis added); *see also id.* (making clear "EPA's expect[ation] that each federal, state and tribal representative will contribute *his/her* scientific, professional, and/or traditional knowledge in good faith and on behalf of the entity he/she represents.") (emphasis added).

Plaintiff elsewhere alleges that the "IGTT update" reflected "examples of the collective advice that the IGTT provided." Am. Compl. ¶ 153. The exhibit on which plaintiff relies here, however, merely lists a series of bullet points reflecting IGTT input; nowhere does it support the allegation that the advice was "collective" or "group" advice. *See* PI Ex. 233 (Dkt. No. 82-4 at 55).

2. The EPA's Use of Contractors Does Not Constitute a FACA Violation.

Plaintiff's Amended Complaint alleges that the EPA improperly used contractors in violation of FACA as part of what it has called the "Anti-Mine Assessment Team." *See* Am. Compl. ¶¶ 119, 137.[27] That claim fails because contractors are not subject to FACA, and because plaintiff's own

[27] Plaintiff's allegations are particularly difficult to discern on this point. The Amended Complaint identifies the "Anti-Mine Assessment Team" as consisting of members of the BBAT and members of the IGTT. *See* Am. Compl. ¶¶ 118, 119. Plaintiff claims, in turn, that the BBAT included numerous non-federal employees; some are identified as employees of ICF international, while others are identified elsewhere as SEE members; still others are identified by name only. *See id.* ¶¶ 119, 129. While the Amended Complaint does not specifically identify NatureServe as a contractor, all of the non-IGTT individuals identified in Paragraph 119 are either individuals who worked under the ICF or NatureServe contracts, or are SEE members. *See* Parkin Decl. ¶ 39 n.3 (identifying individuals who worked under the NatureServe contract); Am. Compl. ¶ 119 (identifying individuals who worked under the ICF contract); Am. Compl. ¶ 129 (alleging that Gary Sonnevil and Dave Athons are SEE members). Therefore, and once the IGTT is properly excluded from FACA's reach, the only remaining questions for this Court to resolve regarding the so-called "Anti-Mine Assessment Team" involve the EPA's use of contractors and SEE members as part of the BBAT.

allegations demonstrate that these contractors were providing operational support to the EPA, rather than providing advice as a committee.

Under FACA, "the main rule" is that "the 'Act does not apply to persons or organizations which have contractual relationships with Federal agencies.'" *Food Chem. News*, 900 F.2d 328, 331 (D.C. Cir. 1990) (Ruth Bader Ginsburg, J.) (quoting H.R. Conf. Rep. No. 92-1403, 92d Cong., 2d Sess. 2, *reprinted in* 1972 U.S.C.C.A.N. 3508, 3509)); *see also* H.R. Rep. No. 92-1017, 1972 U.S.C.C.A.N. 3491, 3494 (FACA term "advisory committee" does not include contractors or consultants). As the D.C. Circuit put it, "Congress was no doubt mindful that government contractors, unlike the groups that prompted the enactment of FACA, . . . are subject to procurement regulations designed, or at least intended, to provide checks against waste and other misuses of government resources." *Food Chem. News*, 900 F.2d at 331 (internal citation omitted); *see also Tucson Rod & Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1030 (D. Ariz. 1998) (contractors not subject to FACA). Were the rule otherwise, no government agency could employ contractors to assist them with agency functions without running afoul of FACA. Accordingly, an agency's use of contractors does not implicate FACA.

Plaintiff's allegations regarding the EPA's contractors also do not state a claim for a separate reason. As even plaintiff alleges, these contractors provided operational support to the EPA by drafting portions of the BBWA. *See* Am. Compl. ¶ 120 ("Anti-Mine Assessment Team" drafted BBWA); *id.* ¶ 121 (members of so-called committee "drafted[ ] portions of the BBWA and its Appendices); *id.* ¶ 123 ("The non-federal employee members of the BBAT were utilized to assist EPA in drafting the BBWA"); *id.* ¶ 138 (allegation that the EPA provided "work assignments"); *id.* ¶ 196 ("EPA established and utilized the Anti-Mine Assessment Team FAC to research and draft

the BBWA, which became the basis for EPA's Section 404(c) action to block Pebble Mine."); *id.* ¶ 198 ("The non-federal employee members of the BBAT were utilized to assist EPA in drafting the BBWA and its Appendices in cooperation with EPA employees.").[28] Yet this type of operational support does not constitute a FACA violation, as it does not involve providing advice. *See* 41 C.F.R. § 102-3.40(k).

In *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929 (D.C. Cir. 1995), for example, a federal agency established a panel consisting of twenty-three experts to develop certain health guidelines. The D.C. Circuit held that the panel was not an advisory committee as defined by FACA. Noting that "the dispositive issue as to establishment" under FACA "is whether the Panel's purpose was to provide 'advice or recommendations,'" the Court held that FACA does not apply because the panel was "operational, developing guidelines for health care practitioners, rather than advisory to the federal government." *Id.* at 933, 934; *see also Pub. Citizen*, 491 U.S. at 446 (for FACA to apply, the work of an advisory committee is to be "exclusively advisory in nature"). In addition, under the analysis set forth in *Sofamor Danek* and *Public Citizen*, the fact that plaintiff has alleged that the so-called "Anti-Mine Assessment Team" engaged in operational functions dooms its claim. *See Sofamor Danek*, 61 F.3d at 936 (rejecting contention that committee could engage in dual purpose of providing operational support and provide advice); *Pub. Citizen*, 491 U.S. at 446.

In short, the EPA's use of outside contractors involved routine, operational support that does not, as a matter of law, violate FACA.

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[28] Plaintiff's allegations that the contractors provided operational support are correct. *See* Frithsen Decl. ¶ 5 (EPA used contract support from NatureServe to "compile the background information represented in several of the appendices" of the BBWA, and used a contract with ICF to assist EPA scientists "primarily with the development of Volume I of the Assessment").

3. SEE Members Are Not Subject to FACA.

Plaintiff also makes an issue of the fact that the EPA has utilized individuals who are members of its Congressionally authorized SEE Program as part of the BBAT. According to plaintiff, "[n]on-federal employees" who participated as part of the so-called "Anti-Mine Assessment Team" "include those persons who might have been hired by EPA under EPA's [SEE] Program." Am. Compl. ¶ 129. Plaintiff's argument regarding the SEE program is that, as an employment law matter, SEE members "are not federal employees" and, according to plaintiff, the assistance of two SEE members in preparing the BBWA was improper under FACA. *See id.*

Plaintiff does not actually describe the SEE program, which "provides an opportunity for retired and unemployed older Americans . . . to share their expertise with the [EPA]" through an EPA-established program of grants and cooperative agreements. *See* www.epa.gov/ohr/see/brochure/backgr.htm. The SEE program was established pursuant to the Environmental Programs Assistance Act of 1984, Pub. L. No. 98-313, 98 Stat. 235, *codified at* 42 U.S.C. § 4368a. The EPA's use of SEE employees is therefore both Congressionally authorized and does not implicate any of the concerns that FACA was enacted to rectify.

Congress views SEE program participants as having a unique relationship with the EPA, and has encouraged the EPA to utilize the technical expertise of SEE enrollees in its highest priority initiatives. In a report accompanying the 1992 appropriations bill to fund the EPA, the Senate Appropriations Committee "reaffirm[ed] its support for the [SEE] Program, which uses older Americans to provide technical assistance to EPA," and "call[ed] upon EPA to utilize SEE enrollees in other program areas, particularly" areas that are "high priorities for EPA." S. Rep. No. 102-356, at 104 (1992). The Senate Committee also "reemphasize[d] that the SEE Program should not be

subject to work restrictions or limitations placed on contractors and contract employees," "recognize[d] a unique working relationship exists between the national aging nonprofit organizations and EPA in utilizing older persons," and "reaffirm[ed] that the SEE participants . . . are not employees of either EPA or the national aging organizations which administer programs for EPA under the Environmental Programs Assistance Act." *Id.* (quoted in *Daniels v. Browner*, 63 F.3d 906, 908-09 (9th Cir. 1995)).[29]

Subjecting the work of SEE enrollees to the procedural requirements of FACA would ignore the "unique working relationship" between the EPA and SEE enrollees, and run counter to the Congressional exhortation that the EPA "utilize SEE enrollees in all its activities." H.R. Rep. No. 102-710, at 59 (1992). It would be inconsistent with the SEE program if every work group including a SEE enrollee had to be formally chartered, have balanced membership, be overseen by a Designated Federal Officer, be open to the public, and otherwise meet the requirements of FACA. This result would also be contrary to FACA's aim of avoiding wasteful government expenditures. Congress could not have intended the SEE program and FACA to yield such absurd results. The Court should therefore reject any argument that the inclusion of two SEE enrollees on the BBAT "transformed" it into an advisory committee subject to FACA.

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[29] The House of Representatives Committee on Appropriations' report on the same bill likewise "reaffirm[ed] its support for the [SEE] program" and "urge[d] EPA to utilize SEE enrollees in all its activities . . . ." H.R. Rep. No. 102-710, at 59 (1992). The House Committee "recognize[d] the unique working relationship between the national aging nonprofit organizations and EPA in utilizing older persons," and that SEE enrollees "should not have to adhere to certain work restrictions or limitations." *Id.* (quoted in *Daniels*, 63 F.3d at 909). "Nearly identical language can be found in House Committee Reports accompanying 1993 and 1994 EPA appropriations bills." *Daniels*, 63 F.3d at 909; s*ee* H.R. Rep. No. 103-150 (1993); H.R. Rep. No. 103-555 (1994).

For the foregoing reasons, this Court should dismiss plaintiff's Amended Complaint for lack of jurisdiction or, in the alternative, for failure to state a claim. Nonetheless, even if this Court denies this motion on these grounds, it should find that the Amended Complaint violates Rule 8, as set forth below.

III. PLAINTIFF'S AMENDED COMPLAINT VIOLATES RULE 8.

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see also* Fed. R. Civ. P. Form 17 (providing example of complaint that, as stated in Rule 84, "illustrate[s] the simplicity and brevity" contemplated by Rule 8). The purpose of the short and plain statement is to "enable determination of the competence of the court, the appropriate procedures for the particular type of adjudication, the type of trial, and the remedies available." *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996).

A complaint's length, clarity, and inclusion of prolix or irrelevant allegations determine its compliance with Rule 8. *See, e.g.*, *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058-59 (9th Cir. 2011) (citing cases and explaining that a pleading may not be of "unlimited length and opacity"); *McHenry*, 84 F.3d at 1180 (affirming dismissal of pleading that was "written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs"); *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir. 1985) (holding district court did not abuse its discretion in dismissing a "confusing and conclusory" pleading); *United States ex rel. Cohen v. City of Palmer*, No. 3:11–cv–00199–SLG, 2014 WL 3533989, at *4-5 (D. Alaska July 15, 2014) (concluding that amended complaint containing "numerous allegations not relevant to the . . . claim" violated Rule 8). The burden on both the defendant and

the court are also relevant factors in determining whether a pleading violates Rule 8. *See Cafasso*, 637 F.3d at 1059 (criticizing plaintiff for "burden[ing] her adversary with the onerous task of combing through [the complaint] just to prepare an answer that admits or denies such allegations"); *McHenry*, 84 F.3d at 1179-80 (considering the "unfair burdens on litigants and judges").

Plaintiff's Amended Complaint fails to comply with Rule 8. Containing 218 paragraphs that consume 42 pages, the Amended Complaint, in terms of length, is comparable to, and in some cases longer than, those that courts have previously found to be in violation of Rule 8. *See McHenry*, 84 F.3d at 1174, 1177 (53-page amended complaint); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981) (23-page amended complaint with 24 pages of addenda); *Schmidt v. Hermann*, 614 F.2d 1221, 1224 (9th Cir. 1980) (30-page amended complaint); *City of Palmer*, 2014 WL 3533989, at *4-5 (45-page amended complaint). Further, the Amended Complaint contains numerous allegations that, while relevant to plaintiff's other lawsuits against defendants, have no bearing on the issue of defendants' adherence to the requirements of FACA. *See City of Palmer*, 2014 WL 3533989, at *4-5. For example, the Amended Complaint, prior to making any FACA-related factual allegations, sets forth plaintiff's theory that the EPA's response to plaintiff's FOIA requests has been inadequate. *See* Am. Compl. ¶¶ 25-28. Plaintiff also uses the Amended Complaint as an opportunity to litigate its claim that defendants misused their authority under Section 404(c). *See id.* ¶¶ 3-6, 38, 99, 154, 165, 182.

Additionally, the Amended Complaint is "prolix in evidentiary detail," *see McHenry*, 84 F.3d at 1180, discussing, for instance, television advertisements by an organization prior to that organization's alleged membership in an advisory committee, Am. Compl. ¶ 34, and an alleged request for "an update on any literature compilations," *id.* ¶ 52. Allegations are also redundant.

Compare, e.g., *id.* ¶ 53 (alleging that EPA employee coordinated meeting between the BBAT and authors of an "embargoed" report) *with id.* ¶ 102 (same), *id.* ¶ 106 (same), *and id.* ¶ 132 (same); *compare id.* ¶ 35 ("[T]he Anti-Mine Coalition FAC transformed into an advisory committee that was under the management and control of EPA.") *with id.* ¶ 40 ("EPA managed and/or controlled the Anti-Mine Coalition."); *compare id.* ¶ 41 ("EPA also set the agenda for the meetings with this FAC.") *with id.* ¶ 50 ("EPA also set the agenda for numerous meetings convened with the Anti-Mine Coalition . . . ."). As discussed above, other allegations are confusing, *see id.* ¶¶ 29, 78, 115 (failing to identify the nature of the so-called committee), or contradictory, *see id.* ¶¶ 33, 40, 81, 94 (alleging that the EPA decided the membership of so-called committee but also alleging that committee members initially coordinated and collaborated among themselves), thereby compounding the pleading's lack of clarity. Other allegations are written in the tone of a press release, further indicating that the Amended Complaint does not fulfill its intended role of "enabl[ing] determination of the competence of the court, the appropriate procedures for the particular type of adjudication, the type of trial, and the remedies available." *See McHenry*, 84 F.3d at 1180. Plaintiff alleges, for example, that defendants' conduct "flies in the face of good government." Am. Compl. ¶ 6. Plaintiff later alleges that defendants "colluded . . . to rig events" and "tipped off" certain favorable publications. *Id.* ¶ 48.

Finally, in addition to the likely burden the Amended Complaint will place on this Court, *see McHenry*, 84 F.3d at 1179-80, defendants submit that they will be unduly burdened if required to "comb[] through [the complaint] just to prepare an answer that admits or denies" the lengthy allegations presented over 218 paragraphs. *See Cafasso*, 637 F.3d at 1059. Therefore, this Court should find that plaintiff's Amended Complaint fails to comply with Rule 8.

The Ninth Circuit has long held that, where a plaintiff repeatedly violates Rule 8, dismissal is appropriate. *DeWitt v. Pail*, 366 F.2d 682, 685 n.1 (9th Cir. 1966). Here, this Court has already determined that Pebble's original Complaint violated Rule 8, in fact describing it as "the most outrageous violation of Rule 8 that I think I've ever seen." Tr. of Proceedings at 68, *Pebble Ltd. P'ship v. EPA*, No. 3:14-cv-00171-HRH (D. Ak. Nov. 234, 2014). For the reasons described above, the Amended Complaint also violates Rule 8. Accordingly, dismissal is appropriate under Federal Rule of Civil Procedure 41(b).[30]

Even if the Court were to decide not to dismiss the Amended Complaint, it should address the pleading's "excessively detailed factual allegations" through "less drastic alternatives." *See Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1127-32 (9th Cir. 2008); *see also DeWitt*, 366 F.2d at 685 (explaining that Rule 12, Rule 15, Rule 16, and Rules 26-37 also provide procedural mechanisms to correct a "vague or prolix complaint"). *But see Hearns*, 530 F.3d at 1136-39 (Kleinfeld, J., concurring in part and dissenting in part) (explaining that district court's dismissal was not an abuse of discretion and noting that "[t]he district court owes it to the other litigants in other cases as well as to defendants to husband its resources for cases that are properly pleaded."). Therefore, as an alternative to dismissal, defendants request that the Court "strike the surplusage" from the Amended Complaint or "excuse[] Defendants from answering those paragraphs." *Hearns*, 530 F.3d at 1132. Specifically, the Court should strike, or excuse defendants from answering, paragraphs 2-7, 14-28, 34, 38-77, 82-83, 87-114, 121-140, and 144-56.

[30] Alternatively, this Court should dismiss the action for failure to comply with its earlier order to file an amended complaint. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1260–61 (9th Cir. 1992).

CONCLUSION

For all of these reasons, this Court should dismiss plaintiff's First Amended Complaint.

January 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 23, 2015, I caused to be filed electronically the foregoing MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS with the Clerk of Court using the Court's CM/ECF system, which sends a Notice of Electronic Filing to counsel of record.

/s/ Brad P. Rosenberg
BRAD P. ROSENBERG